UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION _____ This Document Relates To: ALL ACTIONS	)	MDL No. 14-2551 (SRN/JSM) **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL CONFIDENTIALITY DE-DESIGNATION BY THE NHL**

INTRODUCTION

Plaintiffs' forthcoming Motion for Class Certification presents evidence, common to all class members, that the NHL knew or should have known for decades that repeated brain trauma increases the risk of later-in-life neurological illnesses—and that it should have warned its players of this risk. This common evidence will demonstrate, *inter alia*, the NHL's recklessness on the issues of unnecessary violence, concussions, repeated concussive and sub-concussive blows and player safety, as well as its intentional disregard for scientific evidence connecting concussive or sub-concussive events and neurodegeneration. The evidence documents the NHL's concomitant pursuit of a public relations campaign denying any connection between head trauma and long-term neurological problems, to the detriment of its players.

Most of this evidence has been produced by the NHL itself. Yet, the NHL wants to cloak that evidence in a shroud of secrecy, marking them as "Protected" under the protective orders which were entered in this case to expedite discovery. As the Court is

well-aware, Plaintiffs successfully challenged many of these confidentiality designations under Rule 26(c)'s lenient "good cause" standard, both through the meet and confer protocol established by the parties and by appeal to the Court. But at the certification stage, the NHL is required to meet a substantially higher burden—the stringent "compelling reasons" standard that applies to judicial records—to prevent full public access to these proceedings. This it cannot do.

Given the importance of the issues raised by Plaintiffs' Motion for Class Certification, the need for transparency is paramount. Indeed, the need for public access is much greater than in most cases, where de-classification is routinely ordered over predictable objections by the producing party that wants to hide their conduct with claims of secrecy. The public and class members have an acute interest in concussions in sport and the long-term consequences of brain trauma resulting from repeated concussive and sub-concussive blows. The evidence Plaintiffs will rely upon in their certification motion, and upon which many of their experts rely in their supporting declarations, tell a different side of the story than the false picture the NHL has sought to paint through its sophisticated public relations campaign—namely, that Plaintiffs' case is unsupported by the evidence. *See Constand v. Cosby*, 112 F. Supp. 3d 308 (E.D. Pa. 2015), *appeal dismissed as moot*, 833 F.3d 405 (3d Cir. 2016); *Cohen v. Trump*, No. 13-2519, 2016 U.S. Dist. LEXIS 69985, at *6 (S.D. Cal. May 27, 2016).

In light of the December 9, 2016 deadline for the filing of their Motion for Class Certification, Plaintiffs respectfully seek de-designation of 27 documents that, in whole or part, the NHL intends to keep secret. Plaintiffs submit that each of the documents

identified in the Affidavit of Michael C. Cashman ("Cashman Aff."), which have been submitted for *in camera* review, are judicial records to which the presumption of public access applies because they will be relevant to and play a role in the determination to certify a class in this matter. Further, Plaintiffs request that the Court overrule the two overarching objections the NHL relies upon for all documents at issue in its effort to hide the facts from the public—specifically, that disclosure would (1) chill future full and frank discussion on various topics, which are not commercially sensitive but which the NHL claims implicate its external relationships, and (2) reveal purportedly commercially sensitive information. Alternatively, Plaintiffs ask the Court to review the documents submitted *in camera*, and hold that the NHL has failed to meet even the lower "good cause" standard under Fed. R. Civ. P. 26(c).

BACKGROUND

The Court has previously addressed the issue of de-classification, but in the context of material produced in discovery rather than judicial records filed in support of a substantive motion. *See* Docs. 315 and 408. In this context, the Court's prior ruling found that the NHL had, for many documents, failed to establish "good cause" for continued secrecy under Rule 26(c) lenient standard for materials produced in discovery. *See* Doc. 443, March 4, 2016 Order ("3/4/2016 Order"), *affirming in part* and *overruling in part* Doc. 315 ("12/9/2015 Order"). In particular, the Court ordered de-designation, in whole or part, where documents involved "issues *germane* to this lawsuit and important to the health and safety of the public, [or] reflected presentations on concussions and head hits [.]" 3/4/2016 Order at 11-12 (emphasis added).

With respect to a few documents, the Court sustained the NHL's objections to de-designation under the "good cause" discovery analysis. The Court remarked, that in the context of discovery, (1) disclosure of documents (or portions of documents) would "chill" future deliberations, "impair" full and frank discussion, or "reveal strategic thinking," which could potentially affect the NHL's internal or external relationships; or (2) documents contained "commercially and competitively sensitive information" whose disclosure might "result in a windfall to the NHL's 'competitor,' the National Football League." 3/4/2016 Order at 3-4. Notably, even under the lower "good cause" standard applicable to documents produced in discovery, the Court observed that some documents presented a "close call" for continued confidential treatment. 3/4/2016 Order at 13. For all documents, the Court rejected the potential for "embarrassment" as a reason supporting confidential treatment. *See generally, id.*

Plaintiffs were assured that they could later seek de-designation of any materials, whether improperly designated as confidential in discovery or, obviously, for judicial records filed in support of a merits related motion. *See* 12/9/2105 Order at 48. Following this Court's 3/14/2016 Order, the parties engaged in an additional meet and confer process, through which Plaintiffs identified documents to be filed with their Motion for Class Certification, but for which the NHL had not removed the confidentiality designation. Plaintiffs requested that the NHL de-designate these documents on the grounds that they would be filed with the class certification motion and thus constitute judicial records.

The NHL has de-designated some, but not all of the documents that Plaintiffs believe should be de-designated in connection with their forthcoming Motion for Class Certification. Cashman Aff. ¶ 3. Despite the higher "compelling reasons" standard it must meet at this stage of the litigation for evidence supporting a motion related to the merits such as class certification, *see infra*, the NHL continues to assert its "chill deliberations" and "commercially sensitive" objections to public disclosure. Cashman Aff. ¶ 4. The NHL has not identified or asserted any other objections in support of its secrecy claims. Those objections are without merit and should be rejected.

ARGUMENT

I. The Presumptive Right of Access Applies to the Exhibits that Plaintiffs Will Attach to Their Motion for Class Certification.

As the Court is aware, both the Constitution and the common law provide the public with a presumptive right of access to judicial records and proceedings. The right of access "bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings, and 'to keep a watchful eye on the workings of public agencies.' It also provides a measure of accountability to the public at large, which pays for the courts." *IDT Corp v. eBay, Inc.*, 709 F.3d 1220, 1222 (8th Cir. 2013) (quoting *Nixon v. Warner Comm's*, 435 U.S. 589, 598-99 (1978); other internal citations omitted). "This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers v. Va.*, 448 U.S. 555, 569 (1980).

The "parties cannot, by their own private arrangement, dictate the flow of information in what is otherwise a public proceeding, unless there is a good reason to do so." *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2014 U.S. Dist. LEXIS 180788, at *25 (D. Minn. Oct. 14, 2014) (internal citation omitted) (Mayeron, J.). More recently, the District of Minnesota, by adoption of proposed Local Rule 5.6., has recognized that, "*parties have been filing too much information under seal in civil* cases . . . Even if such information is covered by a protective order, that information should not be kept under seal unless a judge determines that a party or nonparty's need for confidentiality outweighs the public's right of access." [Proposed] L.R. 5.6, 2017 Advisory Cmte. Note, at p. 4, *available at* http:// www.mnd.uscourts.gov/local_rules/LR-5-6.pdf (emphasis added). Here, however, one party—the NHL—is unilaterally hiding important information, seeking to prevent public disclosure even in the context of judicial records attached to a merits based motion.

The limited confidentiality protections afforded to litigants in discovery do not apply to documents that are judicial records. *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002) ("[T]hose documents...that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality."). In contrast to documents that may only be "tangentially related…to the underlying cause of action," *Seattle Times Co.*, 467 U.S. 20, 33 (1984), records that "*play a role in the adjudicative process, or adjudicate substantive rights*," are judicial records to which the common law presumption of public access applies. *Krueger*, 2014 U.S. Dist. LEXIS 180788, at *30-34

(emphasis added) (citing cases from the appellate and district courts in the First, Second, Fourth, Ninth, and District of Columbia Circuit courts); *see also*, *Baxter*, 297 F.3d at 545 ("documents that influence...the judicial decision" are judicial records that must be disclosed to the public). The presumptive right of public access may be overcome only with a "showing of 'compelling reasons'" to justify non-disclosure, as compared to the more lenient "good cause" standard under Rule 26(c). *Krueger v. Ameriprise Fin., Inc. et al.*, No. 11-2781, Doc. 557, 1/15/15 Order at 14 (affirming in part Report & Recommendation, citing *Healey v. I-Flow, LLC*, 282 F.R.D. 211, 214 (D. Minn. 2012)) (Nelson, J.).

In cases involving public personalities or quasi-public institutions like the NHL, the presumption of public access to evidence that "play[s] a role in the adjudicative process" applies with even greater force. *See, e.g., Constand v. Cosby*, 112 F. Supp. 3d 308 (E.D. Pa. 2015), *appeal dismissed as moot* 833 F.3d 405 (3d Cir. 2016); *Cohen*, 2016 U.S. Dist. LEXIS 69985, at *6. Similarly, in class actions "transparency has a heightened value" because "[t]he class action is a procedural device offering a number of public benefits" and "lawsuits filed on behalf of a class potentially affect the rights of persons who are not parties to the case[.]" *Cochran v. Volvo Grp. of N. Am., LLC*, 931 F. Supp. 2d 725, 730 (M.D.N.C. 2013). Thus, evidence which "plays a role in the adjudicative process" on a motion to certify a class on claims of significant importance to the public against a quasi-public institution are entitled to a high level of presumptive public access. Such is the case with respect to the evidence which Plaintiffs will be submitting with their Motion for Class Certification. That evidence must be disclosed to the public.

II. The Presumptive Right of Public Access Applies Here Because a Class Certification Motion Presents Common Evidence "Apt to Drive the Resolution" of the Case.

The NHL cannot credibly dispute that the documents submitted by Plaintiffs in support of their Motion for Class Certification will "play a role in the adjudicative process." Plaintiffs' Motion will present common evidence demonstrating that this case "depend[s] upon a common contention ... of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). As in any class action, the Court must weigh the evidence presented to determine whether it can "generate common answers *apt to drive the resolution of the litigation.*" *Id*. (emphasis added). No one document will likely be dispositive in the class certification context, but all "play a role."

In *Krueger*, Magistrate Judge Mayeron declined to adopt a bright-line rule that all "documents attached to a motion for class certification" are, *ipso facto*, judicial records. Nevertheless, following the reasoning in *Rich v Hewlett-Packard Co.*, Magistrate Judge Mayeron recognized that "in some circumstances a motion of class certification could bear on the merits of the case for the purpose of triggering the presumption of public access." *See* 2014 U.S. Dist. LEXIS 180788, at *35-36, n.8 (citing *Rich*, No. 06-03361, 2009 U.S. Dist. LEXIS 64033 (N.D. Cal. July 20, 2009)). Synthesizing these statements, extraneous documents which are not submitted for legitimate purposes might not trigger the presumption of public access, but any document which is likely to influence or play a role in the process of deciding a class certification motion will almost always constitute a

judicial record that the public is entitled to see unless the producing party can meet the "compelling reasons" test for maintaining its secrecy claims.

The presumption that exhibits supporting a class certification motion are judicial records subject to public disclosure has been recognized by several courts both before and after Magistrate Judge Mayeron's ruling in *Krueger*. These courts have held that motion papers and documents attached to class certification motions are judicial records because those materials necessarily "play a role" in the adjudicative process, and thus, relate to the merits of the case. *See Cochran*, 931 F. Supp. 2d at 728-31 (holding briefing and supporting documents attached to certification motion were "judicial records" to which the presumption of access applies, and declining to permit wholesale sealing); *Opperman v. Path, Inc.*, No. 13-00453, 2016 U.S. Dist. LEXIS 17222, at *23-24 (N.D. Cal. Feb. 11, 2016); *Corvello v. Wells Fargo Bank N.A.*, No. 10-05072, 2016 U.S. Dist. LEXIS 11647, *4-5 (N.D. Cal. Jan. 29, 2016). As explained by the Ninth Circuit in the context of a preliminary injunction motion:

> The focus in all of our cases is on whether the motion at issue is *more than tangentially related to the underlying cause of action.* It is true that nondispositive motions are sometimes not related, or only tangentially related, to the merits of a case…. But plenty of technically nondispositive motions—including routine motions in limine—are strongly correlative to the merits of a case

Ctr. for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1098-99 (9th Cir. 2016) (emphasis added) (quoting *Seattle Times Co.*, 467 U.S. at 33). In short, the presumptive right of public access might not apply to material attached to the motion willy-nilly for the sole or primary purpose of public disclosure, but exhibits and briefing which are

relevant to and which "play a role in the adjudicative process" such as a class certification motion most definitely are clearly judicial records to which the presumptive right of public access attaches.

Recent decisions affirm that public access is presumed because the examination of the class certification record involves the analysis of issues which are "more than tangentially related" to the merits of Plaintiffs'' case. *See Ctr. for Auto Safety*, 809 F.3d at 1098-99. In that case, the Ninth Circuit reversed a district court ruling that a preliminary injunction motion was non-dispositive, and therefore a motion to unseal records would be reviewed under Rule 26(c)'s "good cause" standard. The Ninth Circuit explained that while some cases have used the words "dispositive" and "non-dispositive" to evaluate the standard for judicial records and public access, these are not "mechanical classifications" but rather are "descriptive terms…indicative of when a certain test should apply." *Id.* at 1098 (internal citations and quotations omitted). The *Auto Safety* court then affirmed that the "compelling reasons" test applied: "To only apply the compelling reasons test to the narrow category of 'dispositive motions' goes against the long held interest 'in ensuring the public's understanding of the judicial process and of significant public events.'" *Id.*

Here, the Court's decision with respect to Plaintiffs' certification Motion will be critical to the adjudicative process. Just as clearly, the decision on the Motion for Class Certification, which will obviously be based on the evidence Plaintiffs submit, will relate to the merits of this case.

Plaintiffs anticipate the NHL will argue, based upon *dicta* in Magistrate Judge Mayeron's *Krueger* decision, that an "actual reliance" standard should be applied on a document by document basis to determine whether exhibits are judicial records, and that this analysis can be done only after the class certification motion is decided. That contention is misplaced. "Actual reliance" is not the standard, *see supra*. Furthermore, Plaintiffs respectfully submit that Magistrate Judge Mayeron did not actually adopt or apply an "actual reliance" standard. To the contrary, Magistrate Judge Mayeron suggested a broad standard as to what constitutes a judicial record: documents that are "relevant to and integrally involved in the resolution of the merits of the case" and not "extraneous" to the opinion deserve the presumption of public access. *See Krueger*, 2014 U.S. Dist. LEXIS 180788 (citing *G & C Auto Body, Inc. v. Geico Gen. Ins. Co*., No. 06-048989, 2008 U.S. Dist. Lexis 124119, at *9 (N.D. Cal. March 11, 2008)). The "actual reliance" standard is not supportable because it would improperly and unnecessarily limit the right of public access.

In sum, given the nature of this case, it cannot be seriously disputed that all the exhibits which Plaintiffs will attach to their Motion for Class Certification will influence or "play a role in the adjudicative process" and therefore constitute judicial records to which a strong presumption of public access attaches. As such, the NHL must meet the "compelling reasons" standard, not the good cause standard, in seeking to maintain its secrecy claims for the class certification briefing and exhibits at issue in this Motion.

III. The NHL Cannot Rebut the Presumptive Right of Access.

To overcome the presumption that the public should have full access to Plaintiffs' Motion for Class Certification and all supporting exhibits, the NHL must meet the stringent "compelling reasons" burden to justify continued secret treatment of the records at issue. This it cannot do.

What constitutes a "compelling reason" is a discretionary determination. That discretion is to be "exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Comm's*, 435 U.S. 589, 598-99 (1978) ("It is difficult…to identify all the factors to be weighed in determining whether access is appropriate"); *see, e.g., Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (preventing access to sensitive information about a minor child). Although this Court has previously applied a six-factor test formulated by the D.C. Circuit to determine whether the presumption of access has been overcome, these factors are simply guidelines and do not apply where, as here, the producing party seeking to maintain its secrecy claims fails to meet the "compelling reason" burden in the first instance. *See* 12/9/2015 Order at 47-48 (citing factors from *United States v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980)). In other words, the *Hubbard* factors do not test whether a proffered reason for nondisclosure is compelling; if a litigant has provided a compelling reason for nondisclosure, it is more precise to say that the factors assist in the determination of whether the document at issue should be disclosed *in spite of* the compelling reason for nondisclosure.

A. The NHL's "Chill Deliberations" Objection Is Not a Compelling Reason to Overcome the Presumption of Public Access.

The NHL continues to claim that public disclosure of many documents would prospectively chill future deliberations, and would allegedly prevent the NHL, the Board of Governors, General Managers, or various subcommittees from engaging in undefined "full and frank" discussions regarding various matters, such as rules changes and supplemental discipline. *See* 3/4/2015 Order at 3-4, 11, 15. This objection is specious in the context of a substantive motion such as Plaintiffs' Motion for Class Certification and should be overruled. The NHL cannot claim any kind of deliberative process privilege, and thus it is not a compelling reason to prevent public access. *See infra*.

The NHL is no different than the thousands of other corporations whose strategic planning, operations, and internal rule-making are conducted in liminal spaces where decision-makers are influenced by competing concerns and externalities, only one small part being whether their decision-making process will one day see daylight. Certainly with respect to the issues touched by this litigation, "significant deterrents" to memorializing "frank analyses are already currently present." *Tharp v. Sivyer Steel Corp*., 149 F.R.D. 177, 183 (S.D. Iowa 1993). Indeed, the NHL's "chill deliberations" objection is simply a version of the self-critical analysis evidentiary privilege, which neither the Minnesota Supreme Court nor the Eighth Circuit has recognized, and this District Court has not "warmly embraced." *In re Baycol Prods. Litig*., MDL No. 1431, 2003 U.S. Dist. LEXIS 28975, at *11-12 (D. Minn. Mar. 21, 2003) (declining to extend the privilege and noting that "this [Court] is unpersuaded that failure to recognize the

privilege will have a chilling effect on a party's internal investigations, legal compliance, or evaluations").

"Generally, the privilege for self-critical analysis 'is based upon the concern that disclosure of documents reflecting candid self-examination will deter or suppress… compliance with the law or with professional standards.'" *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1438 (D. Kan. 1995); *see also, Tharp*, 149 F.R.D. at 179-80 (explaining history of privilege in context of affirmative action and employment discrimination case). As noted by a case that the *NHL used* in arguing that document disclosure would purportedly inhibit future full and frank discussion, "*this type of argument must be viewed with some skepticism*" even under the more lenient Rule 26(c) "good cause" standard. *Byrnes v. Empire Blue Cross Blue Shield*, No. 98-8520, 2000 U.S. Dist. LEXIS 702, at *14-16 (S.D.N.Y. Jan. 24, 2000) (citing cases where self-critical analysis privilege was rejected). S*ee also In re Salomon Inc. Secs. Litig.*, 1992 U.S. Dist. LEXIS 17280, 1992 WL 350762, at *4 (S.D.N.Y. Nov. 13, 1992) (rejecting privilege to management control studies and internal audit reports, noting that the "economic efficiencies, the accuracy of financial reporting and the improvement of business standards achieved by [such programs and studies] are so integral to the success of a business that the free flow of information is not likely to be stemmed by the possibility of future disclosure.'").

Appropriately employing this skepticism, numerous district courts within and outside of this Circuit have declined to seal records where a party has contended disclosure would harm its internal deliberations. *See Alaska Elec. Pension Fund v.*

Pharmacia Corp., 554 F.3d 342, 351 n.12 (3d Cir. 2009) (stating self-critical analysis privilege is not a basis for sealing records in a securities fraud case, and noting that the Third Circuit has never recognized the privilege); *Tinman v. Blue Cross & Blue Shield*, 176 F. Supp. 2d 743, 746 (E.D. Mich. 2001) (declining to seal documents insurer claimed were protected by self-critical analysis privilege, noting that insurer had already attached similar information to a pleading); *Davis v. Kraft Foods N. Am*., No. 03-6060, 2006 U.S. Dist. LEXIS 87140, at *11 (E.D. Pa. Nov. 30, 2006) (denying motion to strike exhibits claimed as subject to the privilege, and filed in connection with renewed motion for class certification).

Similarly, courts routinely allow unsealing or non-confidential treatment of materials that potentially paint an employer, such as the NHL, in a potentially negative light. *See, e.g., California ex rel. Lockyer v. Safeway, Inc*., 355 F. Supp. 2d 1111, 1123 (C.D. Cal. 2005) (weighing "the labor policy interest in the confidentiality of the Employers' hypothetical, potential future use of a 'similar' [CBA] on one side, … against …the fact that the labor dispute involving this MSAA is long over, there is an alleged antitrust injury to the public at issue in this litigation, and the court records involve a dispositive motion"); *Davis*, 2006 U.S. Dist. LEXIS 87140, at *11 (ordering that documents relating to how employer "treated its minority employees" were relevant to class certification and should not be stricken from the record); *Loseke v. Depalma Hotel Corp*., No. 13-3191, 2014 U.S. Dist. LEXIS 100977, at *10 (D. Neb. July 24, 2014) (noting fact that FLSA settlement agreement contained a confidentiality provision was

not a "compelling basis" sufficient to overcome the presumption of public access to the settlement agreement).

The NHL's objection is not compelling. The Court should overrule it, and hold that the documents previously deemed confidential under the "good cause" discovery standard should be de-classified now. Further, the Court should rule that the remaining documents submitted with this Motion *in camera* should be filed in unsealed form because the grounds for their sealing is clearly outweighed by the more compelling interests of absent class members and the public in more fully understanding the issues presented by Plaintiffs in their Motion for Class Certification.

B. The NHL Cannot Show That Any Commercial Interest Is Compelling Reason Enough to Overcome the Presumptive Right of Public Access.

The NHL claims that four records contain commercially sensitive information requiring nondisclosure. *See* Cashman Aff. ¶¶ 10, 11, and 12. To date, the NHL has failed to provide concrete, particularized examples showing harm from disclosure of the information it wants to prevent public access to. There is nothing in the NHL's current round of objections to suggest that its commercial or competitive interests would be harmed by disclosure of the documents submitted *in camera*. Indeed, the NHL does not have a competitor in the field of professional hockey in the U.S. or in Canada.

To the contrary, in similar class action cases courts routinely find a party's asserted commercial interest insufficient to overcome the presumptive right of access. The recent *Cohen* decision is instructive. 2016 U.S. Dist. LEXIS 69885, at *17-19 (S.D. Cal. May 27, 2016). There, non-party The Washington Post intervened to unseal a

number of exhibits attached to the motion for class certification, including four "Playbooks" that Trump University (TU) claimed contained trade secrets. Notably, the magistrate judge had previously ruled that the Playbooks were "arguably trade secret," and thus protected from disclosure under Rule 26(c)'s "good cause" standard. *Id.* at *5-7.

Applying the "compelling reasons" standard, Judge Curiel reached a different conclusion at the certification juncture, and unsealed the contested documents. The *Cohen* court found that TU failed to provide any support for the statement that the information at issue "retains any commercial value"—in part because some of the information had been disclosed and TU had not resumed operations. *Id.* at *20. Obviously, Trump "University" had many more direct "competitors" than the NHL, and yet disclosure was ordered. Vague assertions are inadequate absent very specific proof of financial harm caused directly by the disclosure of specific information that is unique to the producer.

Opperman is similarly on point. 2016 U.S. Dist. LEXIS 17222, at *23-24. There, Apple argued that exhibits filed in connection with a class certification motion should be sealed because they "reflect internal Apple processes and deliberations that Apple regards as highly confidential" and that secrecy was required "to protect the integrity of the process by which Apple reviews and approves apps." *Id.* at *23. But the court found that "nothing in these documents represents a secret, distinct, or unique process for the 'technical investigations of apps,' how a company might discuss compliance with its own policies, or 'how Apple determines what should be communicated to app developers about review status.' Rather, the documents in question resemble those in

myriad other cases in which one company seeks to make a determination about the conduct of another company." *Id.*; *see also Baxter Intern., Inc.*, 297 F.3d at 547 (noting that statements that documents must be kept confidential "because we say so" or that "disclosure could …harm [Abbot's] competitive position" are insufficient even under a "good cause" standard); *Corvello*, 2016 U.S. Dist. LEXIS 11647, at *4-5 (rejecting Wells Fargo argument for sealing because "conclusory statements that the public dissemination of the information could harm its business, do not present compelling reasons to conceal the material from the public" (citing *Ctr. for Auto Safety*, 2016 U.S. App. LEXIS 374, at *3-4)).

Courts routinely have declined to seal potentially sensitive or confidential information, whose disclosure simply evidenced negative or bad business practices, as opposed to true trade secrets. For example, the Second Circuit Court of Appeals declined to seal a special litigation committee report submitted with a summary judgment motion, stating that "[t]he potential harm asserted by the corporate defendants is in disclosure of poor management in the past. That is hardly a trade secret. The argument that disclosure of poor management is so harmful as to justify keeping the Report under seal proves too much since it is a claim which grows stronger with the degree of misconduct." *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982).

Likewise, in *Publicker Indus., Inc. v. Cohen*, the Third Circuit declined to seal transcripts containing "sensitive" information about the plaintiffs' "bad business practice," noting the policy interests "in protecting unsuspecting people from investing in Publicker in light of its bad business practices are not overcome by the proprietary

interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment." 733 F.2d 1059, 1074 (3d Cir. 1984); *see generally Procter & Gamble Co. v. Bankers Trust Co*., 78 F.3d 219, 225 (6th Cir. 1996) (interest of private corporation or its executives "in protecting their vanity or their commercial self-interest simply does not qualify as grounds for…keeping the information under seal").

Indeed, much of the information the NHL claims is commercially sensitive is years, if not decades old, and reports on market exigencies or consumer preferences that may not even exist in 2016. *E.g.,* PRN 28 (1998 Study), PRN 29 (2007 Study); Cashman Aff.

¶ 11. "Speculative allegations of injury from the disclosure of years-old information are not sufficient to warrant issuance of a protective order"—much less sealing. *Deford v. Schmid Prods. Co., Div. of Schmid Labs., Inc*., 120 F.R.D. 648, 654 (D. Md. 1987).

The NHL's commercial sensitivity objection has no merit under either the "good cause" or "compelling reasons" standard. The Court should overrule all such objections, and order de-classification of all documents submitted with this Motion *in camera*.

IV. The NHL Has Not Shown Good Cause to Seal Records Previously Not Considered by this Court Related to the Class Certification Motion.

Alternatively, the NHL has not met even the lower "good cause" standard applicable to discovery materials. To determine whether the "good cause" standard has been met, this Court considers: "(1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper

purpose; (3) whether disclosure of information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promoted fairness and efficiency; (6) whether a party benefitting form the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public." Doc. 443, 3/4/2106 Order at 7 (citing *Constand*, 112 F. Supp. 3d at 312-13, and *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994)).

Here, there is no question that this case involves issues important to the public, nor is there any question that Plaintiffs want to share this information with absent class members and the public "to promote fairness and efficiency." For the same reasons discussed with respect to the lack of compelling reason to allow sealing, there are no private interests here that could override the substantial public interest in disclosure of records providing the basis for this Court's adjudication of Plaintiffs' Motion for Class Certification. These records must be de-classified under any standard.

CONCLUSION

The NHL has failed to provide "compelling reasons" to keep the evidence at issue in this Motion secret. Plaintiffs therefore respectfully request an order overruling the two objections at issue, as they apply to the documents submitted *in camera*, and de-classifying these documents in their entirety.

HELLMUTH & JOHNSON, PLLC

Dated: November 22, 2016

By:/s Michael R. Cashman

Michael R. Cashman (#0206945)
8050 West 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
mcashman@hjlawfirm.com

Charles S. Zimmerman (MN #0120054)
Brian C. Gudmundson (MN #0336695)
David M. Cialkowski (MN #0306526)
ZIMMERMAN REED, PLLP
1100 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
charles.zimmerman@zimmreed.com
brian.gudmundson@zimmreed.com
david.cialkowski@zimmreed.com

Stuart A. Davidson (FL #84824)
Mark J. Dearman (FL #982407)
Kathleen B. Douglas (FL #43240)
Janine D. Arno (FL #41045)
ROBBINS GELLER RUDMAN
& DOWD LLP
120 E Palmetto Park Road
Boca Raton, FL 33432
Telephone: (561) 750-3000
sdavidson@rgrdlaw.com
mdearman@rgrdlaw.com
KDouglas@rgrdlaw.com
JArno@rgrdlaw.com

Hart Robinovitch (MN #0240515)
ZIMMERMAN REED, PLLP
14646 North Kierland Blvd., Suite 145
Scottsdale, AZ 85254
Telephone: (480) 348-6400
hart.robinovitch@zimmreed.com
brad.buhrow@zimmreed.com

Steven D. Silverman (MD #22887)
Stephen G. Grygiel (MD #09169)
William Sinclair (MD #28833)
SILVERMAN, THOMPSON,
SLUTKIN & WHITE, LLC
201 North Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
ssilverman@mdattorney.com
sgrygiel@mdattorney.com
bsinclair@mdattorney.com

Plaintiffs' Co-Lead Counsel

Lewis A. Remele (MN #0090724)
J. Scott Andresen (MN #0292953)
Jeffrey D. Klobucar (MN #0389368)
BASSFORD REMELE
33 South 6th Street
Minneapolis, MN 55402
Telephone: (612) 333-3000
lremele@bassford.com
sandresen@bassford.com
jklobucar@bassford.com

Plaintiffs' Liaison Counsel

Michael R. Cashman (#0206945)
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
mcashman@hjlawfirm.com

Thomas Demetrio (ARDC #611506)
William T. Gibbs (ARDC #6282949)
CORBOY & DEMETRIO
33 North Dearborn Street
Chicago, IL 60602
Telephone: (312) 346-3191
tad@corboydemetrio.com
wtg@corboydemetrio.com

Brian D. Penny (PA #86805)
Mark S. Goldman (PA #48049)
GOLDMAN, SCARLATO & PENNY PC
101 East Lancaster Avenue, Suite 204
Wayne, PA 19087
Telephone: (484) 342-0700
penny@gskplaw.com
goldman@gskplaw.com

Vincent J. Esades (MN #0249361)
James W. Anderson (MN #0337754)
HEINS MILLS & OLSON, PLC
310 Clifton Avenue
Minneapolis, MN 55403
Telephone: (612) 338-4605
vesades@heinsmills.com
janderson@heinsmills.com

Thomas J. Byrne (CA #179984)
Mel Owens (CA #226146)
NAMANNY, BYRNE, & OWENS, APC
2 S. Pointe Dr.
Lake Forest, CA 92630
Telephone: (949) 452-0700
tbyrne@nbolaw.com
mowens@nbolaw.com

Robert K. Shelquist (MN #21310X)
W. Joseph Bruckner (MN #147758)
Rebecca Peterson (MN #0392663)
LOCKRIDGE GRINDAL NAUEN
P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
wjbruckner@locklaw.com
rapeterson@locklaw.com

Jeffrey D. Bores (MN #0227699)
Bryan L. Bleichner (MN #0326689)
CHESTNUT CAMBRONNE PA
17 Washington Avenue North, Suite 300
Minneapolis, MN 55401
Telephone: (612) 339-7300
jbores@chestnutcambronne.com
bbleichner@chestnutcambronne.com

Michael J. Flannery
CUNEO GILBERT & LADUCA, LLP
7733 Forsyth Boulevard, Suite 1675
St. Louis, MO 63105
Telephone: (314) 226-1015
mflannery@cuneolaw.com

Daniel E. Gustafson (MN #202241)
David A. Goodwin (MN #386715)
Joshua J. Rissman (MN #391500)
GUSTAFSON GLUEK, PLLC
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Phone: (612) 333-8844
Fax: (612) 339-6622
dgustafson@gustafsongluek.com
dgoodwin@gustafsongluek.com
jrissman@gustafsongluek.com

Charles J. LaDuca
CUNEA GILBERT & LADUCA, LLP
8120 Woodmont Avenue, Suite 810
Bethesda, MD 20814
Telephone: (202) 789-3960
charles@cuneolaw.com

Shawn M. Raiter (MN #0240424)
LARSON KING, LLP
30 East Seventh Street
Suite 2800
St. Paul, MN 55101
Telephone: (651) 312-6500
sraiter@larsonking.com

Plaintiffs' Executive Committee